party and that the unsuccessful trustees the first appellants in this case are not entitled to their costs out of the estate.

Appeal dismissed.

Solicitors: *Laycock & Ong; Allen & Gledhill.*

TAN KHENG KUAN v. LIM CHEN TEIK & ORS.

[O.C.J. (Hepworth J.) October 30, 1964]

[Penang — Civil Suit No. 253 of 1963]

Negligence — Crossing line of oncoming traffic — Special duty of care.

Damages — Personal injury — Brain injury — Loss of understanding and memory — Unsound mind and incapable of managing himself or his own affairs — Loss of amenities of life.

Road Traffic — Crossing line of oncoming traffic — Duty of care.

The plaintiff, a trishaw rider, was crossing a junction when there was a collision between a motor cycle driven by the second defendant and a motor car driven by the third defendant at about the centre of the junction. The result was that the second defendant lost control of his motor cycle which proceeded to collide with the plaintiff's trishaw overturning the trishaw and throwing the plaintiff to the ground. As a result the plaintiff suffered a fracture of the parietal bone on the right and a craniotomy carried out on the plaintiff's head showed that there was damage to the middle meningeal artery and there was laceration of the dura mater and brain tissue. The effect of the accident was that the plaintiff could not concentrate on what he was doing and was found to be of unsound mind and incapable of managing himself and his affairs.

Held: (1) the damage sustained by the plaintiff was solely due to the negligent driving of the motor car by the third defendant;

(2) in the circumstances the appropriate award under general damages should be $37,600 ($12,600 for loss of earnings and $25,000 for loss of amenities).

Observations on duty of driver in turning vehicle across the general route of traffic.

Cases referred to:—

(1) *Liow Sang* v. *Chai Choo Kin & Anor.* [1962] M.L.J. 429.

(2) *Jenkins* v. *Greenwood* (1953) 1 Kemp & Kemp, 2nd ed. 200.

(3) *Bird* v. *Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.

CIVIL SUIT.

Lim Swee Gaik (Miss) for the plaintiff.

Wong Sai Heng for the 1st and 2nd defendants.

Yeap Ghim Guan for 3rd defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff, Tan Kheng Kuan, who resides at 68-C, Bagan Jermal, Penang, sues *in forma pauperis* by his committee, Lim Eng Tin, and was a trishaw rider until January, 1962.

The first defendant, who lives at No. 80, Jahudi Road, Penang, defends by his guardian *ad litem*, Wah Seng Jong, and was at all material times the owner of Honda motor-cycle registered No. PC.579. The second defendant, who lives at No. 34, Green Hill Drive, Fettes Park, Penang, defends by his guardian *ad litem*, Yee Hon Him, and was at all material times the rider of motor-cycle PC.579. The third defendant lives at No. 45, Burmah Road, Penang, and was at all material times the owner of Fiat motor-car registered No. P.755.

On the 20th January, 1962, at about 11 p.m. the second defendant was riding motor-cycle PC.579 along Kelawei Road in the direction of the junction of Bagan Jermal Road, Tanjong Tokong Road and Kelawei Road with the first defendant on the pillion. On the same day and at the same time the third defendant was driving motor-car P.755 in the opposite direction along Tanjong Tokong Road towards the said junction. On the same day and at the same time the plaintiff was riding his trishaw along Kelawei Road in the direction of the said junction, that is to say in the same direction as motor-cycle PC.579 ridden by the second defendant, having as passengers in the trishaw his wife (P.W.2) and son.

At a time when the plaintiff, riding his trishaw, had almost completed crossing the said junction and reaching Tanjong Tokong Road, there was a collision between motor-cycle PC. 579 ridden by the second defendant and motor-car P.755 driven by the third defendant at a point approximately at the centre of the said junction. The result was that the second defendant lost control of motor-cycle PC.579 which proceeded to collide with the plaintiff's trishaw overturning the trishaw and throwing the plaintiff and his wife and son to the ground. As a result the plaintiff sustained severe injuries to his head.

The plaintiff claims that the injuries sustained by him were the result of the negligent driving of motor-cycle PC.579 by the second defendant as the servant or agent of the first defendant and/or the negligent driving of motor-car P.755 by the first defendant, and claims damages.

The first and second defendants plead that the collision was caused or contributed to by the negligent driving of the third defendant and the third defendant pleads that the collision was caused or contributed to by the negligent driving of the second defendant and/or by the negligence of the plaintiff. At the hearing the third defendant abandoned his allegation of negligence on the part of the plaintiff and confined himself to

alleging that the collision was caused or contributed to by the negligence of the second defendant.

The evidence showed that the first and second defendants were proceeding along Kelawei Road with the intention of going to Fettes Park to take the first defendant to his home. They were accompanied by two friends (one of whom was P.W.3) who were following behind, also on a motor-cycle. The third defendant, who had been having dinner at the Springtide Restaurant, was proceeding along Tanjong Tokong Road with the intention of taking his friend (D.W.4) to his home in Ayer Rajah Road via Bagan Jermal Road. The first and second defendants allege that on reaching the junction of Bagan Jermal Road, Tanjong Tokong Road and Kelawei Road the third defendant in motor-car P.755 turned to his right from Tanjong Tokong Road into Bagan Jermal Road without giving any sign and without stopping. The result was that motor-car P.755 was cutting across in front of motor-cycle PC. 759 and that all that the second defendant had time to do was to swerve to his left in an endeavour to avoid a collision. In the event the front of motor-car P.755 brushed the first defendant's right leg and the back of motor-cycle PC.579 as a result of which the second defendant lost control and motor-cycle PC.579 struck the plaintiff's trishaw and overturned it.

It was stated by the third defendant that on reaching the said junction with the intention of turning to the right into Bagan Jermal Road he stopped motor-car P.755 in the middle of the road on his side of the road and that the second defendant, who was proceeding at a very high speed, knocked into the front of the third defendant's car while it was stationary and then proceeded to hit the trishaw.

I do not propose to go into the evidence in detail as I am wholly satisfied that what happened was the result of the negligent driving of motor-car P.755 by the third defendant.

The version of the first and second defendants was corroborated by P.W.3, although it has to be borne in mind that P.W.3 was a friend of the first and second defendants. Their version of what took place was also corroborated by the police report made by the third defendant at the time. The reports by the vehicle examiner on the condition of motor-cycle PC.579 and motor-car P.755 reveal damage consistent with the first and second defendants' story. In addition had the third defendant's story been true I do not think that he would have moved his motor-car from where he says he was stationary at the moment of impact. As it was motor-car P.755 was at the side of Bagan Jermal Road.

The third defendant was turning to his offside in the main road cutting across the line of traffic coming from the opposite direction. I find that the second defendant was not driving motor-cycle PC.579 too fast and that the third defendant was not confronted with a sudden emergency. It is a grave fault in motor driving to turn a vehicle across the general route of traffic without first seeing that there is a clear passage available. The act of turning across the line of oncoming traffic is one which imposes a special duty of care which is not necessarily discharged by giving the conventional signal of intention to deviate from one's course but the actual precaution called for in any particular situation is a practical question and depends on the facts of the particular situation. (*Mazengarb's* Negligence on the Highway, 4th edition, page 333).

The second defendant was in no way negligent and in my opinion the injuries to the plaintiff were caused as a direct and immediate result of the third defendant's negligence (*Liow Sang* v. *Chai Choo Kim & Anor.*[1]).

I therefore find that the damage sustained by the plaintiff was solely due to the negligent driving of motor-car P.755 by the third defendant.

Immediately after the accident the plaintiff who was then unconscious was taken to the General Hospital where an X-ray of his head showed a fracture of the parietal bone on the right side. On the 22nd January, 1962, a craniotomy was carried out on the plaintiff's head when it was found that there was damage to the middle meningeal artery and that there was laceration of the dura mater and brain tissue. The plaintiff remained on the dangerously ill list until the 25th January, 1962.

From about the 8th February, 1962, he was fully conscious but was very uncooperative in that he refused to eat or speak and had to be forcibly fed by means of a tube.

On the 23rd February, 1962, he was referred to Dr. Haq, the psychiatrist attached to the General Hospital, Penang. He was very talkative, confused and not aware of his surroundings. The variation in mood persisted for sometime. Even a month later he remained voluble and excessively cheerful not in keeping with the circumstances, although he was gradually beginning to appreciate the nature of his surroundings. He remained amnesic to the incident. He was discharged to the care of his wife on the 5th April, 1962. In Dr. Haq's opinion the plaintiff suffered from a post traumatic psychosis resulting from the head injury. The plaintiff's behaviour indicated to Dr. Haq that he had lost his power of understanding and memory and he

gave Dr. Haq the impression that he was suffering from brain damage.

Dr. Haq again examined the plaintiff on the 27th February, 1963. He found him fairly well nourished and not physically handicapped. His mental condition had improved to some extent from his condition in March, 1962. However, he was incapable of sustained attention and was rather talkative, mostly irrelevant. He was able to appreciate his surroundings and was fairly orientated as to time and person. His memory of events prior to the accident was still impaired and he could not recall events effectively. Dr. Haq came to the conclusion that the plaintiff was incapable of managing his affairs.

On the 9th October, 1964, Dr. Haq again examined the plaintiff and found his mental condition very much the same.

Dr. Haq stated that where as in the case of the plaintiff there has been bleeding into the brain tissue of a serious nature it very often leaves the patient intellectually and emotionally handicapped. He stated that usually such cases showed improvement in three years but they would not be as normal as before. If there is to be improvement in such cases that improvement must be sustained but in the case of the plaintiff 2 years and 9 months after the accident his condition has remained static for the last two years.

To sum up the plaintiff's condition he cannot concentrate on what he is doing and there are occasions on which he cannot carry out simple commands. If he is asked to go to a certain address he will be unable to do it. He has been found to be of unsound mind and incapable of managing himself and his affairs. Dr. Haq considers that his present state represents the maximum possible improvement in his condition.

It is clear from the medical evidence that from the date of the accident the plaintiff has not been capable of engaging in any form of employment and that he never will be able to do so in the future.

The plaintiff claims special damage of $40 repairs to the trishaw, $210 transport expenses and $20 medical reports which are not contested. He also claims loss of earnings from the 20th January, 1962, to the 20th September, 1963, that is 20 months at $250 per month. The defendants submit, and I agree, that $250 per month is excessive on the evidence but that $210 per month would be fair. Twenty months at $210 per month is $4,200. Total damage under the head of special damage I allow at $4,470.

The plaintiff claims general damage for loss of earnings, pain and suffering and that his memory is permanently impaired, that is to say loss of amenities.

Under the heading of loss of earnings, as I have already said, I do not think there is any doubt on the medical evidence that the plaintiff is no longer capable of engaging in any sort of employment and that his mental condition will never improve so as to enable him to do so. The plaintiff was aged 56 at the time of the accident. The defendants concede that an assessment of the plaintiff's earnings at $210 per month is fair and submit that a multiplier of 4 or 5 would give a fair figure. In my opinion a multiplier of 5 is appropriate in this case. This will give a figure for loss of earnings of $12,600.

I shall deal with pain and suffering and loss of amenities together. It was suggested that as the medical evidence showed that the plaintiff was, as a result of the injury, insensitive to pain he could not have experienced any pain and suffering. It may well be that he did not suffer any pain for this reason but I cannot think that there was an absence of suffering. The evidence is that he was prior to the accident in good health, enjoyed a normal existence and carried on the occupation of a trishaw rider, an occupation in which he had been engaged since 1946. Now he is permanently incapable of leading a normal existence or taking any form of employment, but is of unsound mind and incapable of managing himself or his own affairs.

Loss of amenities is a head of damage which does not admit of being measured in terms of money. The courts have to award reasonable damages in the light of previous awards made for comparable injuries. (*Kemp & Kemp*, The Quantum of Damages, 2nd edition, Volume I, page 55). I can find no Malaysian cases in which injuries comparable to those suffered by the plaintiff have been sustained to assist me. In the English case of *Jenkins* v. *Greenwood* which appears in *Kemp & Kemp* at page 200 the results of the injuries were somewhat similar. In that case a police inspector aged 44 and earning £832 a year was awarded £8,000 under this head. The matters to be taken into account are very clearly set out in the judgment of Devlin J. in *Jenkins* case at page 208, which reads as follows:—

> "Then I have to turn to the much more difficult task of endeavouring to estimate something which can never be estimated in money, the loss which the plaintiff has sustained as the result of his present condition of health. The evidence has unveiled a clear picture of a man who was before the accident a happy husband, a popular man, his life being his work, and he has lost everything that for the most part would make life worth living; I said everything, but he has lost much that makes life worth living.
>
> In the future I dare say he will have periods of comparative health; his present state may be to some extent precipitated by the possibility of the imminence of the action and the possibility of his having to give evidence. It may pass. The evidence is that it probably will. He may be able to go home again, where he will

resume, I supose, the same sort of life; he will be depressed, irritable, confused and unable to occupy himself; he will always be liable to outbursts and delusions, or may always be liable, and it may be when one looks at the worst side his condition will deteriorate further, and he might have to become an inmate for long or short periods, conceivably permanently, of a mental home. One does not know but one is faced with the prospect. I do not think it is rhetorical to say that many men would think that it is worse than death, and death would in some way be a release.

If a man is crippled or paralysed he can still make something of his life, if there is still left to him strength of mind; if that is taken away what weapon has he left with which to fight misfortune? On the other hand, there are factors I have to take into consideration on the other side. There is not the same terrible certainty as to the future as there is when a man is crippled or paralysed. There it is definite that there is only one verdict that the doctors can pronounce. In the case of mental health there can be no similar degree of definition and there is the possibility of improvement; that has got to be taken into consideration and one cannot be certain as one can with physical consequences.

There is also a possibility that in some way in some sense deterioration might bring relief; greater acquiescence and a degree of apathy might bring relief to the mind. That is a possibility. One must not look upon his life, though it seems very dark at the moment, as being without, at any rate, glimmerings of hope of a happier future.

I must take into consideration, too, that apart from the headaches there is not the constant physical pain that might well accompany a grave physical injury and which lasts a man all the rest of his life.

I must take into account also that I have assessed, so far as I can, the compensation for loss of earnings, and what I have to do is to put a sum that is solely attributable to the loss which he sustained, in that the spring has gone out of his life. I think I should take a figure — it is hardly more than a figure — which in the practice of the Courts as I understand it is the sort of appropriate figure to take in those circumstances for that loss only, and I take the figure of £8,000.

I am conscious that this is not a case in which money can recompense anything. In a case of physical disability, though money can never restore a limb, or never restore power to a limb, it can provide alternative forms of enjoyment. Here I doubt whether it can do that, but it can at least ensure a measure of comfort which he might not otherwise have, and it will enable him to make provision to spare his wife part of the burden which is their common misfortune, because for her share of it the law does not permit direct compensation to be made."

Just as the consideration of age must be remembered when arriving at the loss of earnings in the case of a plaintiff who can never work again, so must that element be remembered when damages are being assessed for loss of amenities of life. (*Bird* v. *Cocking & Sons Ltd.*[3]). The plaintiff in this case was, as I have said, 56 years of age.

Bearing this consideration, and the observations of Devlin J. in mind, I consider that, in all the circumstances of this case, an appropriate award under this head will be $25,000.

There will therefore be judgment for the plaintiff against the third defendant for $4,470 special damage and $37,600 general damages.

I will hear argument as to costs.

Judgment for the plaintiff.

Solicitors: *Lim Swee Gaik; Lim Kean Siew & Co.; Eugene Khoo & Co.*

PUBLIC PROSECUTOR v. YEOH SIEW BENG

[A.Cr.J. (Gill J.) October 31, 1964]

[Ipoh — Criminal Appeal No. 69 of 1964]

Criminal Law — Offensive weapon — Possession of — Accused a police officer — Possession when in civilian clothes and not on duty — Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, s. 6 (1), (3) (a) — Presumption.

The respondent was charged with being found in possession of an offensive weapon, to wit, a pistol-shaped dagger, otherwise than with lawful authority or for a lawful purpose contrary to section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance. There was evidence that the place where he was found to be so in possession was a public place, that he was in fact a member of the police force and that he was in civilian clothes and not on duty at the time of his arrest. At the close of the prosecution case the respondent was acquitted on the ground that he, being a member of the police force, was presumed to be in possession of the weapon with lawful authority until the contrary was proved.

Held: (1) the presumption under section 6(3)(a) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance arises on proof firstly, that the person found in possession of the offensive weapon was a member of the police force, and secondly, that the weapon in question was carried in or in connection with the performance of his duty as such member of the police force. In this case as there was no evidence whatsoever that at the time of his arrest he was on duty or that he carried the dagger in or in connection with the performance of his duty as a policeman, the order of acquittal should be set aside;

(2) it was not for the prosecution to prove that the accused had no lawful authority because the burden of proving a fact which is especially within the knowledge of any person lies on that person.

Per Gill J.: "A policeman cannot be said to be carrying an offensive weapon with lawful authority unless it is shown that it is the type of weapon which is normally issued to him for the purpose of discharging his duty."

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Daim bin Haji Mohd. Zainuddin (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Gill J.: The respondent was charged in the magistrate's court at Taiping with being found in possession of an offensive weapon, to wit, a pistol-shaped dagger, otherwise than with lawful authority or for a lawful purpose contrary to section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43 of 1958 (hereinafter referred to as the 'Ordinance').